[Lord Ellock Reporter.]

MEMORIAL

FOR

JOHN GALBRAITH of Balgair, DOUGAL BUCHANAN of Craigavern, and Mr THOMAS SCOT Miniſter of the Goſpel in South Leith, accepting Truſtees appointed by the deceaſed John Cunninghame of Balbougie, Writer to the Signet.

THE Memorialiſts have been threaten'd to be charg'd by Mrs Aliſon Cuninghame, ſpouſe to Capt. Robert Mudie of Lieth, and him for his intereſt, for payment of L. 1200 Sterl. alledged to be due to Mrs Mudie by bond of proviſion granted to her by the ſaid deceaſt John Cuninghame her father: And having been adviſed that they were not in ſafety to pay the ſaid ſum to Mrs Mudie, they have preſented a bill of ſuſpenſion, which has been paſt, and is now to be diſcuſſed; and Lord Elliock Ordinary having by interlocutor, 2d March 1771, appointed memorials to be lodged in the boxes, this memorial is humbly offered on the part of the ſuſpenders, whoſe reaſons of ſuſpenſion are founded on the tenor of the bond itſelf.

By this bond Balbougie binds and obliges him, "his heirs and "executors whatſomever, to content and pay to the ſaid Aliſon "Cuninghame, and the children lawfully to be born of her body, "which failing, to my heirs of tallie contained in a diſpoſition and

" tailize made by me of my lands and eſtate of Balbougie, and o-
" thers therein mentioned, to be applied for buying land, and the
" rights thereof to be taken in favours of the ſaid heirs of tailie,
" in the ſame manner and under the ſame conditions contained
" in the foreſaid diſpoſition and tailzie, the ſum of L. 1200 Ster-
" ling money, and that year and day after her marriage, with
" L. 200 of penalty in caſe of failzie, and annualrent of the ſaid
" principal ſum after the ſaid day of payment, till payment of the
" ſame."

In terms of this clauſe Mrs Mudie ſubſumes, that ſhe having been married to Captain Mudie in January 1770, the term of payment of the ſaid bond is paſt, and were there no other clauſe in the bond, there can be no doubt that Mrs Mudie would be immediately intitled to recover the money; but as there are other clauſes in the bond, and as *poſteriora derogant prioribus*, the memorialiſts apprehend, that ſhe is not intitled to recover the money.

The clauſe immediately following that above recited, obliges Balbougie " and his foreſaids, to content and pay to the ſaid A-
" liſon Cuninghame, ſo long as ſhe is unmarried, the ſum of
" L. 100 Sterling of yearly annuity, at two terms in the year,
" Whitſunday and Martinmas, by equal portions; but declaring
" always, that notwithſtanding the foreſaid principal ſum of
" L. 1200 is only payable to her if ſhe marries, yet in caſe ſhe
" ſhould not marry, I hereby give her power to aſſign, legate and
" bequeath the ſum of L. 200 of the above principal ſum to any
" perſon or perſons ſhe pleaſes, which ſum ſhe ſhall diſpoſe of in
" caſe ſhe ſhall not marry:" And then follows the laſt clauſe on which the reaſons of ſuſpenſion are chiefly founded: " And it is
" hereby declared, that in caſe the ſaid Aliſon Cuninghame ſhall
" marry, that neither the intereſt of the L. 1200, or the principal
" ſum itſelf ſhall fall under her huſband's *jus mariti*, or be affecta-
" ble by his creditors, but the intereſt thereof is to be paid to her
" during her life by way of aliment, upon her diſcharge, with-
" out her husband's conſent, and ſo not to be affected by his cre-
" ditors, and the principal ſum to be paid to her bairns equally a-
" mongſt them."

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" As Mrs Mudie has yet no children, the truſtees apprehend that
" the L. 1200 contained in the ſaid bond cannot be exacted from
" them by her: Balbougie ſettled the fee of his whole debts and ſums
" of money, moveable as well as heritable, upon a certain number of
" his friends whom he named his truſtees, of which number Mrs Mudie
" was one, conform to diſpoſition and aſſignation dated 9 Feb. 1764;
" and it is clear, when the whole bond is taken together, that it only gives
" his daughter after his death, if ſhe remains unmarried, a power
" of burthening his eſtate to the extent of L. 200 Sterling, if ſhe
" incline to do ſo; but though ſhe marries, the principal ſum of
" L. 1200 is not to be exigible out of his eſtate by her, but only by
" her children when ſhe comes to have any: If ſhe has none, the
" principal ſum is to remain with the ſuſpenders for the uſe of the
" truſt, and all that Mr Mudie can claim is, that the annualrent of
" that ſum ſhall be paid her during her life; whereas, according to
" the charger's argument ſhe is entitled to recover the money now
" from the Memorialiſts, and give it away next day to whom ſhe
" pleaſes, which is adverſe both to the words and meaning of the
" bond, ſeeing it is evident from them, that the intention of the
" granter was, that the ſum of L. 1200 ſhould be exigible from his
" eſtate by Mrs Mudie's children only.

JO. M'LAURIN.

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